No. 14555

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND LEE ARENAS, APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND DAVID D. SALLEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK, AND DAVID D. SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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ARGUMENT

The Order of November 10, 1953, is not *Res Judicata* on this Appeal.

In its opening brief the United States took the position that, as the Court of Appeals for the Tenth Circuit has already held, *Anglin* v. *Stevenson,* 160 F. 2d 670 (1947), certiorari denied, 331 U. S. 834, interest on

attorney's fees may not be imposed against a fund in court which represents restricted Indian land. Appellant contends (Br. 17–18) that the United States is estopped from making this contention because the unappealed order of November 10, 1953 (R. 18–19) which provided that the amount awarded as attorneys' fees should bear interest from October 6, 1951, is *res judicata* of that issue.

But neither that order nor the failure to appeal from it has any significance.[1] Since the suit involved restricted Indian land it was a suit against the United States and the court's power was limited to the extent of the consent of Congress. Congress had not permitted the imposition of interest. Therefore the order or judgment attempting to charge interest against the fund was more than erroneous—it was void. *United States* v. *U. S. Fidelity Co.,* 309 U. S. 506, 514 (1940); *United States* v. *N. Y. Rayon Co.,* 329 U. S. 654, 658–663 (1947); *United States* v. *Shaw,* 309 U. S. 495 (1940); *Tillson* v. *United States,* 100 U. S. 43 (1879); *Carr* v. *United States,* 98 U. S. 433 (1878). Consequently, whether or not appealed from, the order of November 10, 1953, was without effect. Thus, in the *U. S. Fidelity Co.* case the United States filed suit against a surety

[1] It is to be noted that the order of November 10, 1953, was an order that the restricted land be sold. Until the land was sold it could not be determined whether there would be any excess with which to pay interest. If not, that portion of the order imposing interest would be academic. In other words, the interest of the United States would not be affected until after the sale because unless there was an excess from which to pay interest it could not be said that interest was being imposed on a fund belonging to the United States. Consequently, it is at least doubtful whether the failure to appeal from that order could foreclose review of the interest issue even if there were jurisdiction.

to recover royalties under a mining lease. The defendant set up a judgment *against* the United States, obtained by way of cross-claim in bankruptcy proceedings of the lessee concerning the same royalties. No review of that judgment had been sought. The district court concluded that the judgment barred the claim and the Court of Appeals for the Tenth Circuit affirmed. But the Supreme Court reversed on the grounds that there was no statutory authority for the judgment on the cross-claim against the United States and, consequently, that it was void and could not operate as a bar. The Court stated at p. 514:

> The reasons for the conclusion that this immunity may not be waived govern likewise the question of res judicata. As no appeal was taken from this * * * judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power.

So here the imposition of interest by the order of November 10, 1953, was without statutory authority and "the attempted exercise of judicial power is void." Consequently that order cannot operate as a bar.[2]

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[2] If any judgment is *res judicata* on the question of interest it is the judgment fixing the fee affirmed by this Court in *United States* v. *Preston*, 202 F. 2d 740 (1953). That judgment did not impose interest and when it "was entered and became final the equitable

For the same reasons there is no merit to the remainder of appellees' contentions dealing with the equity of imposing interest (Br. 8–13, 20–21) and the suggestion of waiver or consent by payment of the proceeds of the sale into court to redeem the lands not sold from the lien (Br. 19–20). The Supreme Court in *United States* v. *N. Y. Rayon Co.*, 329 U. S. 654 (1947), made it perfectly clear at pp. 659–660 that neither the equity of imposing interest nor a supposed waiver or consent by anyone except Congress would permit the court "to supply the consent which only Congress can give to the imposition of interest against the United States."

CONCLUSION

Accordingly, it is submitted that the judgment appealed from should be reversed.

Respectfully,

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jurisdiction of the court was exhausted." *Anglin & Stevenson* v. *United States*, 160 F. 2d 670, 673 (C. A. 10, 1947), certiorari denied, 331 U. S. 834. Appellees were thereafter precluded from claiming interest.

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